



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
REGIONAL
COUNSEL

December 19 2012

Confidential Settlement Communication – Subject to Fed R. Evid. 408

Joseph A. Brogan
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Re: *United States v. Port of Tacoma, et al.*, No. 11-cv-05253 (W.D. Wa.)
Basis of Design for Compensatory and Additional Mitigation
Upper Clear Creek Restoration - Final Hydrologic and Hydraulic Analysis for the
Upper Clear Creek Habitat Site

Dear Mr. Brogan,

Thank you for providing the Port of Tacoma's Final Hydrologic and Hydraulic Analysis for the Upper Clear Creek Habitat Site and supporting attachments. We understand from the Port's accompanying cover letter, dated November 20, 2012, that the project design team is continuing to develop the Basis of Design (or the Port's equivalent design document) and that it will be submitted to EPA by the end of December. We look forward to receiving the Basis of Design and to developing a Consent Decree for approval, execution, and lodging with the court by March 1, 2013.

To ensure that the Basis of Design meets EPA's and DOJ's expectations and includes critical elements, we offer the following comments on the documents provided to date. Additional detail and a recommended outline for the Basis of Design are provided in the attached technical memorandum.

Overall, the Final Hydrologic and Hydraulic Analysis represents reasonable progress towards understanding various elements of the proposed Upper Clear Creek restoration. Additional elements must be included in the Basis of Design, however, in order for EPA and DOJ to approve the project and to develop enforceable measures for inclusion in a Consent Decree. In general, the Basis of Design should provide a complete and integrated picture of how the elements of the Upper Clear Creek ecosystem restoration project will work. It should also provide the substantive basis for subsequent review, permitting, and approval processes as the project takes shape. Finally, the Basis of Design should address the environmental benefits of the proposed restoration in sufficient detail to support EPA's and DOJ's approval.

More specifically, the Basis of Design must include several critical elements such as detailed information on the design and construction of key project features, criteria for assessing project success, and identified steps for how the site will be managed and monitored going forward. We have not seen this information in the Port's submissions to date and would like to ensure that necessary elements are included in the Basis of Design, as follows:

- Design elements should include (at a minimum) detailed design sheets for earthwork, an overall plan map/diagram and take off schedules for restoration of plant communities, weed management strategies, a Stormwater Pollution Prevention Plan, and details on construction sequencing and timing.
- As EPA emphasized at our August 15, 2012 meeting and in prior correspondence, the Basis of Design must articulate overall Project Goals and state the Project Targets and Project Standards to meet those goals. This structure provides a basis for demonstrating the environmental benefits of the restoration and assessing restoration success.
- The Basis of Design should include provisions for adaptive management, regular monitoring, and contingency measures that can be invoked to keep various components of the project on track.

In addition, several issues remain from our review of the Final Hydrologic and Hydraulic Analysis. We remain concerned about the lack of microtopographic complexity and believe that additional complexity is needed. Among other things, complex microtopography will provide the restoration area with a diverse array of planting surfaces. We are also concerned that the proposed decrease in elevation for microtopographic features will make it more difficult to establish and maintain conifers and mid-canopy broadleaf deciduous species. In addition, there appears to be insufficient information regarding the central pond feature and sediment accretion processes. Finally, we continue to disagree regarding the issue of "fish traps" and leaving the northern reach of the existing channel intact. Both issues require further coordination with the relevant agencies before a final design decision is reached.

The attached technical memorandum provides additional detail on these issues as well as suggestions for the Port regarding weed management. The memorandum also provides a sample outline for the Basis of Design to help ensure that necessary elements are identified and included. Please also refer to our letter dated August 3, 2012, which provides a detailed discussion of recommended elements for the Basis of Design.

To ensure that the remaining technical issues are resolved expeditiously, we suggest that a technical meeting be scheduled to discuss the issues before the Basis of Design is submitted. While we understand that the upcoming holidays make scheduling difficult, we would prefer that

U.S. v. Port of Tacoma
EPA Letter on Basis of Design
December 19, 2012
Page 3 of 3

the meeting take place in December, if possible, to keep the process on track. Please call me at your convenience at 206-553-6052 to discuss these matters further.

Sincerely,

/s/

Kimberly A. Owens
Assistant Regional Counsel

Attachment

CC: Michael Szerlog, EPA
Mary Anne Thiesing, EPA
Austin Saylor, DOJ
Kent Hanson, DOJ